

molest on their intake' was clearly a reference to the allegations appellant was facing, information about which the jury clearly was already aware."

Our review is limited to the issue of whether any alleged misconduct violated Petitioner's due process rights. *See Thomas v. Borg*, 74 F.3d 1571, 1576 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 227 (1996). A due process violation occurs when it has a substantial and injurious effect of influence on the jury's verdict. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996). The record does not demonstrate how any of the conduct complained of would have affected the verdict. One of the witnesses from whom he obtained an affidavit did not testify, and there is no evidence as to how the other witness' testimony would have been different absent the alleged prosecutorial misconduct. Furthermore, the jury was already aware of the information referred to by the prosecutor on cross-examination, i.e. the charges Petitioner was facing. We thus find that the state court's rejection of this claim was not based on an unreasonable application of federal law, and was not based on an unreasonable determination of the facts.

Accordingly,

IT IS HEREBY ORDERED that Petitioner's Claim 2, 3(b), 3(c), 4(a), and 4(b) are **DENIED**.

IT IS FURTHER ORDERED that the Respondent provide the Court with a complete transcript of the trial, including opening and closing arguments, no later than May 25, 2001.

DATED this 30 day of March, 2001.

s/ _____
William D. Browning
Senior United States District Judge

APPENDIX D

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JUL 31 2001
Clerk U S District Court
District of Arizona
By s/ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

GARY PAUL CASSETT,)	No. CIV 97-548-TUC-WDB
)	
Petitioner,)	ORDER
)	
vs.)	
)	
TERRY L. STEWART, et al.,)	
)	
Respondent.)	
<u> </u>)	

Presently before the Court is Gary Paul Cassett's Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254 ("Petition"). Only one of Petitioner's claims remains — that his due process rights were violated when the trial court allowed testimony by an individual hired by Petitioner's lawyer to write an independent pre-sentence report.

I. BACKGROUND

Gary Paul Cassett was indicted on two counts of child molestation and four counts of sexual conduct with a person under 14. These incidents occurred in November and December 1990, with his stepson.

Petitioner agreed to plead guilty to kidnaping, a class two felony. However, at the change of plea hearing the plea was withdrawn, because the trial court believed the factual basis was insufficient. In preparation for sentencing, his attorney had hired John Sloss to prepare an alternative pre-sentence report, which contained admissions of child molestation, for use in rebuttal to the State's Report. Although the report was prepared with the intention of giving it to the court, Petitioner claims he believed what he told Sloss was confidential.

Petitioner then pled guilty to attempted molestation of a child and attempted sexual conduct with a minor. He claims he did so because this plea made probation available. Prior to an October 4, 1991, sentencing hearing, Petitioner's attorney disclosed the existence of the Sloss alternative pre-sentence report to the prosecutor because he planned to use it if necessary for rebuttal. The Sloss pre-sentence report was not used at sentencing. Cassett was sentenced to twelve years on each count, to run consecutively.

In a Petition for Post-Conviction Relief, Petitioner claimed he was not informed that the sentences would run consecutively. Appellant's plea was vacated and attorney Harold Higgins was appointed to represent Petitioner at trial. During a pretrial hearing, the state disclosed it was going to call Sloss as a witness. Higgins filed a motion *in limine* to exclude Sloss's testimony, which was denied.

Three trials were held in this case. The first ended in a mistrial after the jury learned of the plea and prior sentencing. The court declared a mistrial in the second, after the jury deadlocked. Sloss did not testify at either of these trials, although he had been reserved as a rebuttal witness for the second trial.

At the third trial, the prosecutor informed the court she was going to call Sloss as a witness in her case in chief. In response, Higgins claimed that this put him in the difficult position of having to open the issue of the plea agreement and sentencing, as well as considerations that went into Petitioner's decision to enter into a plea and make the admissions in the alternative report. Sloss testified and, on direct

examination, stated Petitioner told him he had pled guilty to oral sex with his stepson. Higgins elicited additional testimony regarded the guilty plea and the circumstances surrounding it during his cross-examination. Petitioner was convicted of two counts of child molestation and four counts of sexual conduct with a person under the age of 14. The trial court sentenced Petitioner to consecutive prison terms of 20 and 30 years and four life terms.

II. STATUS OF CLAIM

In April, this Court dismissed all of the Petitioner's claims except for his claim involving the use of Mr. Sloss as a witness and the subsequent revelation that he had pled guilty to molestation. The reason this claim remains is because the record provided by the State was incomplete. The Court now has a copy of the opening and closing arguments and the testimony of Mr. Sloss, and may complete the review of petitioner's claim.

The State argued that this claim was procedurally defaulted. the procedural default rested on adequate and independent state grounds, so, Petitioner must have demonstrated cause for the procedural default and actual prejudice, or show that the failure to grant review will result in a "fundamental miscarriage of justice." Petitioner argues that the claim was not properly raised earlier because it did not exist at the time of his first petition. Although the report had been disclosed by that time, Petitioner claims he had not consented to, and was not aware of, its disclosure. More importantly, there had been no trial and Sloss had not been suggested as a state witness. The deprivation of a constitutional right arguably had not yet occurred. Thus, there was sufficient cause to excuse the procedural default.

III. DISCUSSION

When the admission of a pretrial statement results in the admission of a prior guilty plea, a due process violation may exist. The Ninth Circuit has held that where there has been the improper admission of a guilty plea, harmless-error analysis is appropriate. *Standen v. Whitley*,

994 F.2d 1417, 1423 (9th Cir. 1993). The test applied in such a situation considers whether the trial error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* The Ninth Circuit has stated that this review "requires the most painstaking examination of the record and the most perceptive reflections as to the probabilities of the effect of the error on a reasonable trier of fact." *Id.* (internal citations omitted).

In *Standen*, the court of appeals held that the trial court's allowance of evidence concerning the prior plea of guilty had substantial and injurious effect on the jury's verdict. The trial court allowed the prosecution, in response to defendant's argument that the police had failed to properly investigate and had destroyed evidence, to tell the jury that because the defendant had plead guilty it was not necessary to retain the evidence or further investigate. Although the court instructed the jury that they should not consider the plea alone, the court did tell the jury that the withdrawn guilty plea was part of the evidence against the defendant.

Here, the prosecution did not introduce any evidence related to the guilty plea. Rather the defense did so for its own strategic advantage. In his opening statement Petitioner's attorney stated, "You are going to hear some things that Mr. Cassett said shortly after those accusations were made, and I would ask you to wait and judge those things that he said in terms of the overall picture of what was going on at that time, and of the things in Gary's life that he was facing, both outside of Court and inside of Court, and judge why he said the things that he said back then." Later, Petitioner's attorney elicited from him that he had agreed to plead guilty because he was told it was very difficult to defend against charges of molestation and because he was told that if he pled guilty he would be probation eligible and able to provide for his family and see his other son. In closing, the attorney stated, "Mr. Sloss told you a little about it he told you about the very substantial penalties he was facing at the time. He told you that here he was presented with a chance of probation, and what was the central thing. The central motivation in his mind at that time, the central motivation in his mind was reserving some chance at having some relationship with his son,

Chad, some chance of doing that, and if he went to trial and lost, he was gone. . . .He made a choice. He tells you now it was a bad choice. He got up and said certain things that happened that haven't. The fact of the matter is, the facts that the State presented have not been proven to you that those things really did happen.

The State did nothing to exacerbate the situation and did not cross-examine either witness on this information. Thus, in light of this record, the trial court's decision to allow the state to use the testimony of Mr. Sloss and the subsequent revelation of the guilty plea was harmless error.

Accordingly,

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus is **DENIED**.

DATED this 30 day of July, 2001.

s/ _____
William D. Browning
Senior United States District Judge